[Cite as *Frederick v. Vinton Cty. Bd. of Edn.*, 2004-Ohio-550.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
VINTON COUNTY

Bert Frederick,	:	
	:	
Plaintiff-Appellant,	:	Case No. 03CA579
	:	
vs.	:	DECISION AND JUDGMENT ENTRY
	:	
Vinton County Board of Education, et al.,	:	FILE-STAMPED DATE: 2-05-04
	:	
Defendants-Appellees.	:	

APPEARANCES

Daniel N. Abraham, Columbus, Ohio, for appellant.

Daniel D. Mason, Sheffield Village, Ohio, for appellees.

Kline, P.J.:

{¶1} Bert Frederick, individually and as an administrator of the estate of Kimberly R. Frederick, appeals the Vinton County Court of Common Pleas' grant of summary judgment to the Vinton County Board of Education and the Vinton County Local School District (together, "the School"), and to McArthur

Elementary School Principal Sandra Robbins, and substitute teacher Patty Napier (together, "Employees"), on tort claims relating to Kimberly's injury and death on her school playground. Frederick asserts that the trial court erred in failing to apply R.C. 2744.02(B) to preclude the School and Employees' immunity defense. Because the trial court appropriately looked at R.C. 2744.02(B) and R.C. 2744.03(A) in concert to determine the availability of the immunity defense, we disagree.

{¶2} Frederick also asserts that genuine issues of material fact exist pertaining to whether the School and its Employees acted negligently in: (1) maintaining the playground, (2) supervising recess, and (3) training the Employees; and that the School and Robbins acted recklessly in: (1) assigning only one teacher to supervise recess, and (2) designing the playground. Because reasonable minds, when construing the admissible evidence in a light most favorable to Frederick, could conclude that the School negligently maintained and recklessly designed its playground, we agree in part. However, the School and its Employees are entitled to judgment as a matter of law on the issues of negligent supervision and negligent training, as we find that these are discretionary functions entitled to immunity from negligence claims. Additionally, Frederick did not present any admissible evidence to indicate that the School or Robbins acted

recklessly in assigning only one teacher to supervise recess, and therefore the School and Robbins are entitled to judgment as a matter of law on that claim. Thus, we overrule Frederick's first assignment of error and his second assignment of error in part, but sustain Frederick's second assignment of error to the extent that it relates to his claims for negligent maintenance of the playground and reckless design of the playground. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

I.

{¶3} On November 17, 1999, Frederick's seven-year old daughter Kimberly fell on the McArthur Elementary School playground during recess. She died as a result of a blunt trauma to her head. Although the evidence regarding how Kimberly fell is not conclusive, much of the evidence indicates that Kimberly climbed a tree on the playground and fell from it. The School and Employees explicitly state in their brief that they do not contest Frederick's claim that Kimberly fell from the tree for purposes of this appeal.

{¶4} On the day of Kimberly's death, McArthur Elementary School's Principal, Sandra Robbins (nka Pappas), or her staff assigned Patty Napier, a substitute teacher in Kimberly's classroom, to supervise the playground during recess. Robbins testified in her deposition that sixty-six second grade children

were on the playground during recess. Frederick claims that police reports indicate that as many as one hundred twenty-nine children between the ages of seven and ten were on the playground at the time of Kimberly's injury. Napier was the only adult assigned to supervise the children on the playground. Napier was attending to other children when Kimberly fell, and did not observe the accident.

{¶5} The regular second grade teachers and Robbins had observed children swinging from and using the tree in question in this case "like monkey bars." The student handbook does not contain a rule against climbing trees. The second grade teachers put their own "no climbing trees" rule in place, and the teachers informed the children of all the playground rules at the beginning of the school year. But the teachers deposed agreed that they expect children to break rules from time to time.

{¶6} The parties do not dispute that the tree is located on the playground, and is not surrounded by a fence or any other device to prevent children's access to it. The tree has several sturdy, low-hanging branches within close reach of children, which would make climbing the tree relatively easy. A grassy area surrounds the tree, but the grass is worn in a ring surrounding the trunk and limb span in a manner suggesting heavy foot traffic at the base of the tree, and tree roots

protrude from the ground. No mulch or other cushioning, protective material surrounds the base of the tree.

{¶7} Frederick filed a complaint in the trial court alleging negligence and recklessness in the staffing and supervision of the playground during recess, and alleging negligence and recklessness in the maintenance and design of the playground. The School, Robbins, and Napier each filed motions for summary judgment, asserting that they are entitled to political subdivision immunity, because their allegedly negligent acts relate to discretionary decisions or activities undertaken within the scope of their duties. The School and its Employees also asserted that the record does not contain any evidence that they acted recklessly.

{¶8} Frederick opposed the motions for summary judgment, and argued that political subdivision immunity does not apply to negligent maintenance issues such as trimming trees. Additionally, Frederick argued that the School and Robbins acted recklessly in assigning only one supervisor to such a large number of children, that Napier acted negligently in accepting such an assignment without requesting additional supervisors, and that the School acted recklessly in designing the playground.

{¶9} Frederick supported his motion with the affidavit of William Mason, a purported expert on playground safety. Mason attached several exhibits to his

affidavit, including his curriculum vitae and a sworn copy of the U.S. Consumer Product Safety Commission Guidelines of playground safety. Mason opined that the School and its Employees "fell below the established standard of reasonable care" by failing to maintain the playground, by failing to properly design the playground, and by failing to provide adequate supervision.

{¶10} The trial court struck Mason's affidavit on the grounds that it was not based on personal knowledge, and thus did not comply with Civ.R. 56(E). Specifically, the trial court found that Mason never visited the scene of the accident and could not have known that Kimberly fell from a tree or that the playground was not properly maintained. Additionally, the court noted that Mason repeatedly averred that the School and its Employees negligently and recklessly failed to fulfill their duties. Because the affidavit, through its characterization of behavior as "negligent" and "reckless," included legal conclusions, the trial court disregarded it.

{¶11} The trial court concluded that the record contains no evidence that any of the Appellees acted recklessly, and that the record contains no evidence that the Appellees negligently maintained the playground. Therefore, the court concluded that political subdivision immunity applied to bar most of Frederick's claims, and that the absence of evidence of negligence barred his negligent maintenance claim.

Accordingly, the court granted the School's, Robbins', and Napier's motions for summary judgment.

{¶12} Frederick appeals, asserting the following assignments of error: "1. The trial court erred in granting summary judgment as a matter of law by improperly applying a wanton and reckless standard to [Appellees'] conduct where genuine issues of fact exist as to the negligence of Appellees' conduct pursuant to [R.C.] 2744.02(B). 2. The trial court erred in finding that no genuine issue of fact existed demonstrating Appellees[']negligence and recklessness."

II.

{¶13} In his first assignment of error, Frederick asserts that the School and its Employees are not entitled to political subdivision immunity based upon R.C. 2744.02(B) and the Ohio Supreme Court's recent ruling in *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718. Specifically, Frederick asserts that, pursuant to the Court's interpretation of R.C. 2744.02(B), an exception to the general presumption of political subdivision immunity exists for negligent conduct on school grounds. Appellees contend that Frederick's analysis is incomplete, because it stops at the second "tier" of the political subdivision immunity analysis.

{¶14} The availability of statutory immunity raises a purely legal issue. *Hall v. Ft. Frye Loc. School Dist. Bd. of Edn.* (1996), 111 Ohio App.3d 690, 694, citing *Nease v. Med. College Hosp.* (1992), 64 Ohio St.3d 396, 400. Therefore, we review the trial court's determination regarding the application of the R.C. 2744.02(B) exception to political subdivision immunity under a de novo standard of review. See *Continental Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.* (1996), 74 Ohio St.3d 501, 502.

{¶15} "The Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, requires a three-tiered analysis to determine whether a political subdivision should be allocated immunity from civil liability." *Hubbard* at ¶10, citing *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28. The first tier of the analysis, stated in R.C. 2744.02(A)(1), is the general rule that "political subdivisions are not liable in damages." *Hubbard* at ¶11, citing *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 556-557. Public school districts are political subdivisions and providing public education is a governmental function. R.C. 2744.01(F); R.C. 2744.01(C)(2)(c); *Hubbard* at ¶11.

{¶16} The second tier of the analysis requires the court to determine whether any of the exceptions to immunity listed in R.C. 2744.02(B) apply. *Hubbard* at ¶12, citing *Cater*, 83 Ohio St.3d at 28. In *Hubbard,* the issue before the court was

whether any of the R.C. 2744.02(B) exceptions applied. *Id.* at ¶12. The *Hubbard* Court found that an exception did apply. Therefore, the court remanded the matter to the trial court "for the purpose of applying the third tier of analysis necessitated by R.C. Chapter 2744, which requires a determination of whether the board qualifies for any of the statutory defenses listed in R.C. 2744.03," which would reinstate the board's immunity. *Id.* at ¶19. Thus, the *Hubbard* Court did not make a definitive determination that the school district in that case was not entitled to immunity, but rather remanded the matter so that the analysis could be carried through its third tier. *Hubbard* at ¶19; *Cater* at 29.

{¶17} In this case, the trial court explicitly based its determination that the School and its Employees are immune from liability upon the defenses listed in R.C. 2744.03(A)(5) – (6). Thus, the trial court carried its analysis through to the third tier of the political subdivision immunity analysis. Although the trial court did not expressly consider the R.C. 2744.02(B) exception to political subdivision immunity, it effectively did so (and implicitly resolved the issue in Frederick's favor) by considering whether the R.C. 2744.03(A)(5) – (6) exceptions to the R.C. 2744.02(B) exception applied. Because the court found immunity based upon the applicability of R.C. 2744.03, rather than upon the non-applicability of R.C. 2744.02, the court's determination that the School and its Employees are entitled to

immunity is entirely consistent with *Hubbard.* Therefore, we overrule Frederick's first assignment of error.

III.

{¶18} In his second assignment of error, Frederick asserts that the trial court erred in determining that no genuine issues of material fact exist. Frederick asserts that genuine issues of material fact exist based upon the affidavit of his expert, Mason, and that the trial court erred in "criticizing" Mason's evidence.

{¶19} Summary judgment is appropriate only when it has been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(A). See *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 535.

{¶20} A party raising an immunity defense to support a motion for summary judgment "must present evidence tending to prove the underlying facts upon which

the defense is based. *Evans v. S. Ohio Med. Ctr.* (1995), 103 Ohio App.3d 250, 255. See, also, *Vance v. Jefferson Area Local School Dist. Bd. of Edn.* (Nov. 9, 1995), Ashtabula App. No. 94-A-0041. The plaintiff, as the nonmoving party, must then present evidence showing the existence of a genuine issue as to these material facts. *Id.*" *Hall*, 111 Ohio App.3d at 694-695.

{¶21} In reviewing whether an entry of summary judgment is appropriate, an appellate court must independently review the record and the inferences that can be drawn from it to determine if the opposing party can possibly prevail. *Morehead*, 75 Ohio App.3d at 411-12. "Accordingly, we afford no deference to the trial court's decision in answering that legal question." *Id.* See, also, *Schwartz v. Bank-One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 809.

{¶22} However, questions regarding the admissibility of evidence are within the sound discretion of the trial court, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to a party. *State v. Hymore* (1967), 9 Ohio St.2d 122, certiorari denied (1968), 390 U.S. 1024; *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271. The term 'abuse of discretion' connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. *Blakemore, supra,* at 219. When

applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

A.

{¶23} First, we examine whether the trial court abused its discretion or failed to exercise its discretion in line with the rules of procedure and evidence when it disregarded Mason's affidavit. Expert affidavits offered in support of or in opposition to summary judgment must comply with Civ.R. 56(E) as well as the evidence rules governing expert opinion testimony, Evid.R. 702-705. *Copper and Brass Sales, Inc. v. Plating Resources, Inc.* (Dec. 9, 1992), Summit App. No. 15563; *Ambulatory Health Care Corp. v. Schulz* (May 30, 1991), Cuyahoga App. No. 58595. Thus, the affidavit must demonstrate that the affiant's opinion is based on personal knowledge; that the facts contained in the affidavit are admissible in evidence; and that the affiant is competent to testify as to the matter. Civ.R. 56(E). Further, the affidavit must set forth the expert's credentials and the facts or data he considered in rendering his opinion. *Evanoff v. Ohio Edison Co.* (Nov. 10, 1994), Portage App. No. 93-P-0015; *Copper and Brass Sales, supra;* see also Evid.R. 703 and 705.

{¶24} Although Civ.R. 56(E) contains a "personal knowledge" requirement for all affiants, in the context of expert opinions this requirement does not refer to the event underlying the claim. *Schwarze v. Divers Supply*, Stark App. No. 2001CA301, 2002-Ohio-3945, at ¶39; *Pennsylvania Lumbermens Ins. Corp. v. Landmark Elec., Inc.* (1996), 110 Ohio App.3d 732, 738. Requiring personal knowledge of the underlying event would prevent expert testimony in all situations in which the expert was not also an eyewitness to the underlying event. When a qualified expert relies upon facts shown by admissible evidence, his affidavit is admissible for purposes of summary judgment. *Burens v. Indus. Comm.* (1955), 162 Ohio St. 549, paragraph one of the syllabus; *Douglass v. Salem Community Hosp.* (2003), 153 Ohio App.3d 350, 361; *Smith v. Cincinnati Gas & Elec. Co.* (1991), 75 Ohio App.3d 567, 570.

{¶25} In this case, the trial court disqualified Mason's affidavit in part because it found that Mason obviously "never visited the scene of the accident". However, Civ.R. 56(E) does not require Mason to personally visit the scene of the accident in order to testify about it. He could gleen his knowledge of the scene from facts in evidence; namely the deposition and deposition exhibits, including sketches and photographs of the scene, which Mason averred he reviewed.

{¶26} The court further found fault with Mason's affidavit because it was apparent to the court that Mason did not "read all of the statements of students" (emphasis sic) who witnessed Kimberly's accident. The court based this conclusion on the fact that "five students stated that Kimberly was pushed to the ground by another student." First, we note that Civ.R. 56(E) does not require an expert to review "all" existing evidence before rendering an opinion. It only requires that the expert base his opinion on admissible evidence. Additionally, as the School and its Employees admit in their brief, the student statements are not sworn statements, and it is not even certain that the students are mature enough to be competent to testify. Therefore, the student statements do not constitute admissible evidence. The trial court disqualified Mason's opinion on the grounds that he failed to consider inadmissible evidence, when in fact Mason could not have properly considered inadmissible evidence. Thus, the trial court erred in excluding the affidavit on these grounds.

{¶27} The School and its Employees attack the Mason affidavit on the opposite grounds that the trial court used to disqualify it. The School and its Employees contend that Mason must have relied upon inadmissible evidence, i.e., the unsworn student statements that say Kimberly fell from the tree, because there is no other direct evidence that Kimberly fell from the tree. However, the record is

replete with circumstantial evidence that Kimberly fell from the tree, beginning with the simple fact that Kimberly was found unconsciousness under the tree. Additionally, The School and its Employees stipulated for purposes of reviewing the trial court's summary judgment determination that Kimberly received her injury by falling from the tree. Therefore, they cannot base their arguments on appeal upon the lack of evidence regarding the matter.

{¶28} The trial court also excluded Mason's affidavit on the grounds that it states a legal conclusion. It is improper for an expert's affidavit to set forth conclusory statements and legal conclusions without sufficient supporting facts. *Wall v. Firelands Radiology, Inc.*, 106 Ohio App.3d at 335-336; *Davis v. Schindler Elevator Corp.* (1994), 98 Ohio App.3d 18, 21; see also Evid.R. 704 and 705. However, pursuant to Evid.R. 704, an expert's opinion, if otherwise admissible, cannot be excluded solely because it embraces an ultimate issue to be decided by the trier of fact. *Douglass v. Salem Community Hosp.*, 153 Ohio App.3d 350, 360-361, 2003-Ohio-4006 at ¶28. In *Douglass*, the court concluded that because the expert opinion merely stated that the defendant deviated from the standard of care, but did not identify the standard of care, the expert's conclusory opinion was not admissible. *Id.* In contrast, when the expert testimony identifies specific facts to illustrate how a defendant deviated from the accepted standard of care, or the

extent of the deviation, expert testimony that a defendant behaved "negligently" or "recklessly" is admissible. See *Lambert v. Shearer* (1992), 84 Ohio App.3d 266, 276; *Douglass, supra.*

{¶29} In this case, Mason's affidavit does not merely contain allegations that the School negligently or recklessly designed and maintained the playground without identifying the specific facts that illustrate the negligence or recklessness. To the contrary, Mason specifically identified the tree's low-hanging branches and exposed roots, and the School's failure to act in reasonable conformity with an identified standard of care, particularly the standard outlined by the U.S. Consumer Product Safety Commission guidelines for playground safety. Mason specifically described how the School failed to conform to this standard of care by describing the failure to take steps such as trimming the low-hanging branches, adding cushioning material beneath the tree, or installing a fence to limit access to the tree.

{¶30} Because Mason identified facts shown by admissible evidence, namely, deposition testimony and exhibits depicting the scene of the accident, and because he identified the specific facts and standard of care that he believes illustrate that the School was negligent or reckless in designing and maintaining the playground, we find that the Mason affidavit meets the standards for

admissibility outlined by the rules of procedure and evidence. Therefore, the trial court erred in disregarding it in its entirety.

{¶31} Mason also opined in his affidavit that the School and Robbins acted negligently or recklessly in assigning so many students to one teacher during recess. However, Mason failed to identify the standard of care from which the School and Robbins allegedly deviated. While Mason noted the ratio of adults to children on the playground at the time of Kimberly's injury, he did not identify what he would consider a reasonable ratio of adults to children. Instead, he merely labeled the School's and Robbins' decisions regarding playground supervision negligent and reckless. He attached an exhibit to his affidavit entitled "A blueprint for increasing playground safety," which identified an appropriate ratio as approximately one adult to twenty children. However, Mason did not swear to the authority or authenticity of the exhibit nor even mention it in his affidavit. Therefore, it does not meet the standards of admissibility and cannot remedy Mason's conclusory statement. See *Davis v. Findley Industries, Inc.* (Aug.24, 1994), Montgomery App. No. 13982. Thus, the trial court did not err in excluding Mason's averments regarding the supervision of children from its consideration.

B.

{¶32} We now turn our analysis to whether, when considering the evidence (including the admissible portions of Mason's affidavit) in a light most favorable to Frederick, reasonable minds could differ regarding whether Frederick can prevail on his claims against the School and its Employees.

{¶33} The School and its Employees asserted statutory immunity as a defense to Frederick's claims, and therefore bore the initial burden of presenting evidence tending to prove that they are entitled to immunity. See *Hall, supra,* at 695. R.C. 2744.02(A)(1) states, "except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental * * * function." As we noted in our consideration of Frederick's first assignment of error, public school districts are political subdivisions. R.C. 2744.01(F); *Hubbard* at ¶11. Providing public education and the design, construction, reconstruction, renovation, repair, maintenance, and operation of a school playground are governmental functions. R.C. 2744.01(C)(2)(c) and (u); *Hubbard* at ¶11; *Hall* at 695. Thus, the School and its Employees qualify for immunity under the first tier of the immunity analysis.

{¶34} Also as we noted in connection with Frederick's first assignment of error, the general grant of immunity found in R.C. 2744.02(A) is subject to the exceptions contained in R.C. 2744.02(B). The exception contained in R.C. 2744.02(B)(4) states, "political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function." Because Frederick alleged negligence by the School's employees that occurred on the grounds of the School's building, the R.C. 2744.02(B)(4) exception to immunity applies, and the second tier of the political subdivision analysis resolves in Frederick's favor.

{¶35} In the third tier of the immunity analysis, the exceptions contained in R.C. 2744.02(B) are themselves subject to exceptions, which may reinstate the political subdivision's immunity. R.C. 2744.03(A)(3) provides immunity to a political subdivision "if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee." R.C. 2744.03(A)(5) provides immunity to a political subdivision for injuries resulting "from the exercise of judgment or discretion in determining whether to acquire, or how to

use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner." Finally, R.C. 2744.03(A)(6) provides immunity to any employee of a political subdivision unless the employee was acting outside the scope of her duties, was acting recklessly or wantonly, or is expressly subject to liability by statute.

{¶36} Construing R.C. 2744.02(B) and R.C. 2744.03 together, "[i]mmunity operates to protect political subdivisions from liability based upon discretionary judgments concerning the allocation of scarce resources; it is not intended to protect conduct which requires very little discretion or independent judgment. The law of immunity is designed to foster freedom and discretion in the development of public policy while still ensuring that implementation of political subdivision responsibilities is conducted in a reasonable manner." *Hall* at 699, citing *Marcum v. Adkins* (Mar. 28, 1994), Gallia App. No. 93CA17. Thus, a political subdivision can be held liable for damages stemming from negligent maintenance of its buildings or grounds. *Id.* at 699, quoting *Vance v. Jefferson Area Local School Dist. Bd. of Edn.* (Nov. 9, 1995), Ashtabula App. No. 94-A-0041. However, immunity applies to discretionary decisions, and therefore a political subdivision

can only be held liable for injuries resulting from its discretionary decisions if its conduct was reckless or wanton.

1.

{¶37} Frederick alleges that the School negligently maintained the playground by failing to trim the low-hanging branches or take some other measure to mitigate the danger posed by the tree. The School contends that Frederick's claim relates to the design of the playground, not maintenance of the playground, and thus asserts that it is entitled to immunity. The determination of whether Frederick's claim is properly characterized as negligent maintenance or as negligent design is a question of law. *Nease*, 64 Ohio St.3d at 400; *Hall* at 698. In *Hall,* when we were faced with the question of whether a student athlete's injury arose from the design or the maintenance of a sprinkler system on the football field, we noted, "[t]he R.C. 2744.02(B)(4) exception to nonliability can be applicable only to the maintenance of the building or facility after it has been constructed. The decision to 'build or not' is immunized as a matter of law because of its policy/discretionary nature." *Hall* at 699-700, citing *Vance, supra*. We therefore concluded that, while the decision of whether to install a sprinkler system or which sprinkler system to install were discretionary decisions, the upkeep of the field and the sprinkler system was a maintenance issue.

{¶38} Similarly, decisions in this case relating to whether to have trees on the playground, how many trees, or where they should be placed, are discretionary decisions. Likewise, once the School became aware that the children were using the tree as climbing equipment, it could have decided to treat the tree as a piece of climbing equipment, or it could have decided to take measures to prevent the children from climbing the tree, and these decisions would fall within its protected discretion. However, the School's duty to ensure that the tree, like any other fixture on the playground, did not pose a safety hazard is a maintenance issue.

{¶39} In evaluating Frederick's claim for negligent maintenance, the trial court held that the record did not contain any credible evidence that the School was negligent in maintaining the playground. The trial court properly considered and evaluated the maintenance claim under the negligence standard rather than requiring proof of recklessness. However, upon our independent review of the evidence properly before the court, we find that a genuine issue of material fact exists as to whether the School negligently maintained the playground.

{¶40} Specifically, the deposition exhibits depict that the grass around the tree is worn in a manner that suggests heavy foot traffic, and that the limbs on the tree hang low enough for a child to easily reach them. The deposition testimony indicates that the second grade teachers and Robbins had seen children using the

low-hanging limbs of the tree in question like monkey bars. Thus, the School and its teachers were aware, or should have been aware, that the children viewed the tree as a piece of climbing equipment. However, despite the many indicators that children used the tree on the playground like monkey bars, the School did not take measures to prevent children from climbing the tree, such as trimming the low-hanging limbs.[1] Nor did the School take steps to treat the tree as a piece of climbing equipment, such as adding a cushioning layer of mulch at the base of the tree. A property owner has a common law duty to maintain, i.e., trim or remove, trees on his property that he is aware pose a danger to others. See *Pummell v. Carnes,* Ross App. No. 02CA2659, 2003-Ohio-1060 at ¶38. We find that reasonable minds could differ regarding whether the School breached its duty to the children when it chose to take no action. Therefore, we find that the trial court erred in granting summary judgment to the School on Frederick's claim for negligent maintenance of the playground.

2.

{¶41} The remainder of Frederick's claims relate to discretionary decisions by the School or actions undertaken within the scope of Robbins' and Napier's duties as employees of the School. Therefore, the Appellees are entitled to

[1] Although the teachers took it upon themselves to create a "no climbing trees" rule, they also acknowledged in their depositions that they expect children to break to rules from time to time.

summary judgment unless Frederick can point to evidence in the record which could lead reasonable minds to conclude that the School's or the Employees' actions were reckless or wanton.

{¶42} "Recklessness" refers to an act done with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of harm, and that this risk is substantially greater than that necessary to make the conduct negligent. *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105; *Piro v. Franklin Township* (1995), 102 Ohio App.3d 130, 139. Foreseeability refers to the foreseeability of a similar injury, not foreseeability of the specific injury that occurred. See *Oiler v. Willke* (1994), 95 Ohio App.3d 404, 413. The term "wanton" connotes "an entire absence of all care for safety of others and an indifference to consequences, but it is not necessary that an injury be intended or that there be any ill will on the part of the actor toward the person injured as a result of such conduct." *Toles v. Regional Emergency Dispatch Center*, Stark App. No. 2002CA332, 2003-Ohio-1190 at ¶52, quoting *Tighe v. Diamond* (1948), 149 Ohio St. 520.

{¶43} Frederick alleges that the School and Robbins were negligent or reckless in assigning only one teacher to supervise between sixty-six and one hundred twenty-nine students between the ages of seven and ten. The supervision

of students is a discretionary function within the context of R.C. 2744.03(A)(5). See *Marcum v. Talawanda City Schools* (1996), 108 Ohio App.3d 412, 417. Likewise, the allocation of personnel is explicitly a protected function under R.C. 2744.03(A)(5). The Appellees supported their motions for summary judgment with the depositions of Robbins, Napier, and other teachers, who testified that assigning one or two teachers to supervise an entire grade during recess, or about seventy-five students, was not unusual. Additionally, Robbins testified that only one grade level goes to recess at a time.

{¶44} Frederick attempted to rebut this evidence with Mason's affidavit and exhibits, but as we determined in ¶31 above, the affidavit merely stated a legal conclusion as to the adult to student ratio, and the relevant exhibit was not properly sworn to or certified. Additionally, the police report indicating that one hundred twenty-nine students were on the playground at the time police arrived was not properly sworn or certified. Thus, Frederick did not present any admissible evidence to rebut the Appellees' assertion that the School and Robbins were not reckless in assigning one teacher to supervise the entire second grade during recess. Nor did he present any admissible evidence that more than approximately seventy-five students were under Napier's supervision during recess.

{¶45} Therefore, even when construing the evidence in a light most favorable to Frederick, reasonable minds could not conclude that the School recklessly or wantonly exercised its discretion to allocate its personnel by assigning one teacher to supervise the entire second grade. Nor could reasonable minds conclude that Robbins recklessly or wantonly carried out her duties as principal by assigning just one teacher to supervise the entire second grade during recess. Thus, we find that the trial court did not err in granting summary judgment in the School and Robbins' favor on Frederick's claim for negligent or reckless allocation of personnel or supervision of students.

{¶46} Frederick also alleged in his complaint that Napier was negligent in her supervision of students during Kimberly's recess, but did not allege that Napier was reckless in her supervision of the students. Because the supervision of students falls within the scope of Napier's job duties, and because Frederick did not allege Napier was reckless in her supervision of students, Napier is immune from liability on this claim. Therefore, the trial court did not err in granting summary judgment in favor of Napier on Frederick's claim for negligent supervision.

{¶47} Additionally, Frederick alleged in his complaint that the School and Robbins negligently failed to train their employees adequately, and that this

negligent training proximately caused that Kimberly's injury. However, Frederick did not allege that the School and Robbins recklessly failed to properly train the employees. The training of employees requires the exercise of judgment or discretion in the use of personnel and resources, and therefore the School is immune from liability resulting from negligent training. Robbins testified in her deposition that training employees falls within the scope of her duties as principal, and therefore Robbins is immune from liability resulting from negligent training. Because Frederick did not allege recklessness with regard to training, the trial court did not err in granting summary judgment in favor of the School and Robbins on Frederick's claim for negligent training.

{¶48} Frederick also alleged in his complaint that the School and Robbins were reckless in designing the playground. As we noted in connection with Frederick's negligent maintenance claim, the design of the playground includes decisions such as: whether to have trees on the playground; how many trees; where they should be placed; whether and what measures to take to prevent children from climbing trees; whether to treat the tree as a piece of climbing equipment; and whether and what type of cushioning material to use under climbing equipment. The trial court found that the record does not contain any

evidence that the School Board recklessly exercised its discretion or judgment in the use of its facilities by having trees on the playground.

{¶49} The record contains evidence that the School Board or its employees were aware that the students used the tree like monkey bars, and that the only action taken in response to this knowledge was the "no climbing trees" rule that the teachers announced at the start of the school year. The teachers testified in their depositions that they expect children to break rules from time to time. Additionally, the record includes the Mason affidavit and a sworn copy of the U.S. Consumer Product Commission guidelines for playground safety, which indicate that protective surfacing is a necessary precaution for playground climbing equipment. Mason opined that an accident like Kimberly's was not only foreseeable, but also highly probable under the circumstances. When this evidence is construed in a light most favorable to Frederick, reasonable minds could conclude that the School demonstrated an entire absence of care for safety of the children and an indifference to the foreseeable consequence, i.e., an injury caused by a fall from the tree, resulting from the School leaving the tree in place without modification, barriers, or protective surfacing. Therefore, we find that the trial court erred in granting summary judgment in favor of the School on Frederick's claim for reckless design of the playground.

III.

{¶50} In conclusion, we overrule Frederick's first assignment of error. We sustain Frederick's second assignment of error on his claims regarding negligent maintenance and reckless design of the playground. We overrule Frederick's second assignment of error on all other grounds. Accordingly, we affirm in part and reverse in part the judgment of the trial court, and we remand this case for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART
AND CAUSE REMANDED.

Harsha, J., concurring in part and dissenting in part:

I concur in judgment and opinion except for the holding that reinstates appellant's claim for recklessly designing the playground. Like the majority, I conclude the decision to have trees on the playground is discretionary in nature and cannot be characterized as reckless. Unlike the majority, I would limit the need for trimming of the trees, application of barriers and protective surfacing as maintenance issues to be resolved under a negligence standard as we did in Hall, supra, and Section III. B.(1) of this opinion. I do so because trees are included on the playground for their aesthetic value rather than as playground equipment. While the fact that children might climb them is foreseeable, I believe this

"misuse" creates a maintenance issue rather than a design problem. Thus, I would not reverse the trial court's summary judgment on the reckless design cause of action.

Harsha, J.: Concurs in Part and Dissents in Part with Opinion.
Evans, J.: Concurs in Judgment Only.

For the Court

BY: _____
Roger L. Kline, Presiding Judge